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No. 95-566

In The

# Supreme Court of the United States

October Term, 1995

STATE OF MONTANA,

*Petitioner,*

v.

JAMES ALLEN EGELHOFF,

*Respondent.*

**On Writ Of Certiorari To The Supreme Court Of The State Of Montana**

## PETITIONER'S REPLY BRIEF

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## INTRODUCTION

The centerpiece of Respondent's argument is the contention that the Montana legislature "did not purport to change the elements of deliberate homicide." Resp't Br. at 17-18. As such, Respondent argues, evidence of voluntary intoxication was highly "relevant" to the question whether he acted with the requisite mens rea. Accordingly, he concludes, the instruction directing the jury not to consider this evidence in determining his mens rea had the effect of shifting the burden of proof and also deprived him of his constitutional "right" to mount a defense.

This argument completely misses the point. The Montana legislature, acting well within the scope of its authority to define inculpatory and exculpatory behavior, plainly altered the culpability of voluntarily intoxicated persons for all crimes with an intent element, and the Montana Supreme Court did not, and could not, hold otherwise. Accordingly, evidence concerning Respondent's voluntary intoxication was not ***legally*** relevant to his guilt or innocence. Moreover, by restricting the legal relevance of voluntary intoxication, the Montana legislature, while concededly making it easier to convict some defendants, did not shift its burden of proof or interfere with any constitutionally recognized "right" to present a defense.

## ARGUMENT

### I. SECTION 45-2-203 SUBSTANTIVELY ALTERED CRIMINAL CULPABILITY UNDER MONTANA LAW AND DID NOT SHIFT THE BURDEN OF PROOF TO THE DEFENDANT.

#### A. The Montana Legislature Altered Criminal Culpability in the 1987 Amendment.

It is not disputed that the Montana legislature did not technically "redefine" the statutory terms "purposely" or "knowingly" when amending § 45-2-203 in 1987. Nonetheless, the legislature, by stating that "an intoxicated condition may not be taken into consideration in determining the existence of a mental state which is an element of the offense," effectively altered the intent requirement for all state crimes, including the crime of deliberate homicide. By means of this provision, the legislature extracted the entire subject of voluntary intoxication from the mens rea inquiry, based on its substantive judgment that criminal responsibility is not lessened by voluntary intoxication.

To be sure, § 45-2-203 is framed in a manner which arguably could be construed as procedural. That provision, however, is plainly not merely a rule of evidence. To the contrary, it represents the legislature's effort, having defined what conduct is inculpatory in the definitions of the many specific crimes in its Code, to define, on an across-the-board basis, certain conduct which is not exculpatory. It manifestly was within the legislature's authority to do so. *See, e.g., Schad v. Arizona*, 501 U.S. 624, 633 (1991); *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).



Contrary to Respondent's contention, the Montana Supreme Court did ***not*** determine that § 45-2-203 did not substantively modify the mens rea requirement for the crime of deliberate homicide. In the only passage on which Respondent relies, the Court stated that voluntary intoxication evidence "was relevant to the issue of whether Egelhoff acted knowingly and purposely." Pet. App. 11a. Respondent surmised from this that the Court must have found that the definition of deliberate homicide was not substantively modified; otherwise, he suggests, it would not have determined this evidence to be "relevant."

Respondent's reading of the Montana Supreme Court's decision is strained beyond reason. The court clearly did not concern itself with whether the intoxication instruction, or the statute from which it derived, "redefined" the mental state elements of deliberate homicide. The court instead assumed that, but for the instruction, the evidence was logically relevant to Respondent's mental state.

Thus, Respondent errs in saying that the Montana Supreme Court interpreted Montana law at all. In fact, the court did not do so; rather, the sole issue it decided was an issue of federal constitutional law. More specifically, that court, starting from the flawed assumption that various decisions of this Court require the admission of all relevant evidence in order for a trial to be "fair," Opinion at 12a, entirely skipped over the threshold state law question of whether § 45-2-203 changed the intent requirement for deliberate homicide and determined that, because the intoxication evidence was "relevant," Instruction No. 11 violated the Due Process Clause. Put another way, the Montana Supreme Court did not decide

any question of state law that is distinct from its erroneous analysis of federal constitutional law. *Cf. Michigan v. Long*, 463 U.S. 1032, 1040-41 (1982) ("when the adequacy and independence of any state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so"). For this reason, this case turns squarely on the due process issue identified in the question presented, and is not subject to resolution through deference to the state court's decision. *See Wisconsin v. Mitchell*, 113 S. Ct. 2194, 2189-99 (1993) (when state decision does not construe the meaning of a statute, but simply characterizes its practical effects, it does not embody a statutory interpretation to which the Court must give deference).

The Montana Supreme Court's erroneous approach to the constitutional issue underlies its erroneous conclusion. In adopting § 45-2-203, the legislature removed the issue of voluntary intoxication from the mens rea inquiry. Thus, while the court may be correct that evidence of Respondent's intoxication was ***logically*** relevant to his state of mind, it was not correct in holding that this evidence was ***legally*** relevant. Legal relevance is wholly dependent upon the definition of the culpable conduct and, by adopting § 45-2-203, the legislature made evidence of voluntary intoxication legally irrelevant to the crime of deliberate homicide. The only issue is whether that is constitutionally permissible, and for the reasons that follow, it is.



### B. Section 45-2-203 Does Not Shift the Burden of Proof to the Defendant.

In adopting § 45-2-203, the Montana legislature concededly made it easier to convict certain defendants of the crime of deliberate homicide. It did not, however, shift or lessen the State's burden of proof or create any presumption of guilt. Accordingly, this case is not governed by this Court's decision in *In re Winship*, 397 U.S. 358 (1970), and its progeny.

States are free, consistent with the requirements of the Cruel and Unusual Punishment Clause of the Eighth Amendment, to alter the ***substantive*** definitions of crimes, even if by doing so they make prosecution easier. No one doubts, for example, that states have the constitutional authority to criminalize sexual relations with minors by removing the element of "consent" from the jury's consideration, even though that change certainly makes it easier for states to convict defendants of the crime of statutory rape.

Here, § 45-2-203 does not alter the State's burden or create any presumption of guilt and Respondent's reliance on *Sandstrom* is particularly misplaced. He asserts that Montana's burden to prove each element beyond a reasonable doubt was subverted by the voluntary intoxication instruction which "effectively directed a verdict for the State." Resp't Br. at 26. He misconstrues *Sandstrom*, however, and the nature of the instruction given in this case.

The Due Process Clause protects a defendant against conviction except upon proof beyond a reasonable doubt of every fact legally necessary to constitute the crime with which he is charged. *Winship*, 397 U.S. at 364. This

principle similarly precludes a State from using "evidentiary presumptions in a jury charge that have the effect of relieving the State of its burden of persuasion beyond a reasonable doubt on every essential element of a crime." *Francis v. Franklin*, 471 U.S. 307, 313 (1984); *accord Rose v. Clark*, 478 U.S. 570, 580 (1986); *Cabana v. Bullock*, 474 U.S. 376, 384 (1986). The application of the reasonable doubt standard is necessarily dependent upon the substantive law which establishes the elements of the involved crime. Consequently, there is a significant difference between declaring that certain facts have no exculpatory value with respect to a given element of the offense and shifting the burden of proof with respect to that element to the defendant. The former falls within the broad legislative prerogative to determine whether, as a matter of sound public policy, conduct of a particular sort should be allowed to affect criminal culpability, while the latter runs afoul of *Sandstrom*.

The threshold inquiry in ascertaining whether an instruction creates an improper presumption is to "determine the nature of the presumption it describes." *Francis*, 471 U.S. at 313; *Sandstrom*, 442 U.S. at 514. This analysis must focus initially on the specific language challenged. Here, the jury was instructed that

> a person who is in an intoxicated condition is criminally responsible for his conduct and an intoxicated condition is not a defense to any offense and may not be taken into consideration in determining the existence of a mental state which is an element of the offense.

Pet. App. 29a. There is no presumption in the instruction. The first component, which makes an accused in an intoxicated condition "criminally responsible" for his conduct,



is explained in the remainder of the instruction – i.e., a voluntarily intoxicated person may not use the fact of such intoxication as a means to negate any mental element of the alleged offense.[1]

Under the second component, a voluntarily intoxicated person is held just as responsible for his conduct as is anyone else by disallowing use of his intoxicated condition as an affirmative defense. The third component excludes voluntary intoxication from the jury's determination of mental state. It is the third phrase that Respondent claims creates an improper mandatory presumption.[2]

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[1] As discussed in the Petitioner's opening brief at 15-16, the Montana Supreme Court has rejected the claim that the first clause "mandates that a jury find a defendant guilty of the charged crime if the defendant was intoxicated." *Kills On Top v. State*, 901 P.2d 1368, 1380 (Mont. 1995).

[2] Respondent's amicus suggests that the term "defense" could have been construed by a reasonable juror as not limited to affirmative defenses and thus as instructing the jury "not to consider the evidence of intoxication to support points respondent made to defend himself against the State's charges." Nat'l Ass'n of Crim. Defense Law. Br. at 16. The latter reference presumably is to the use of intoxication evidence to establish that Respondent physically could not have committed the crimes because of his intoxicated condition. This contention falls outside the question presented and was not addressed below. The Montana Supreme Court thus stated, "Egelhoff does not contend that he has the right to the affirmative defense of voluntary intoxication. He challenges only the exclusion of evidence from the jury's deliberations for purposes of determining mental state (the 1987 amendment)." Pet. App. 10a. None of the parties, moreover, has disputed before this Court that the jury was permitted to consider the intoxication evidence offered by Respondent at trial for the purpose of

A "mandatory presumption instructs the jury that it must infer the presumed fact if the State proves certain predicate facts." *Francis*, 471 U.S. at 314. The jury here was not commanded to reach a certain result based on certain predicate facts. The jury instead was instructed that the State had the burden of proving the elements of the crime beyond a reasonable doubt and that Respondent was presumed innocent. Pet. App. 27a (Instr. No. 7). The elements that Montana was required to prove were that Respondent purposely or knowingly caused the death of a human being. *See* § 45-5-102(1)(a) (1995). The voluntary intoxication instruction did not shift the burden of proof with respect to any of these elements. Even the Montana court recognized that "burden shifting" is "not technically what happens in a case such as the present one." Pet. App. at 14a-15a. The Due Process Clause is not offended as long as the instructions require proof "beyond a reasonable doubt [of] all of the elements included in the definition of the offense of which the defendant is charged." *Patterson v. New York*, 432 U.S. 197, 210 (1977); *see also Cupp v. Naughten*, 414 U.S. 141, 147 (1973) (instructions, when viewed as a whole, did not shift burden as jury was still instructed on presumption of innocence and that state had burden to prove guilt beyond a reasonable doubt).

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establishing his claim that a fourth person, not Respondent, murdered the victims. Since the issue has not been raised by the parties, it cannot be raised by Respondent's amicus. *See United Parcel Serv., Inc. v. Mitchell*, 451 U.S. 56, 60 n.2 (1981); *see also Wisconsin v. Mitchell*, 113 S. Ct. at 2197 n.2 (since the issues were not developed below and plainly fall outside the question on which certiorari was granted, the Court will not reach the issue).



There is, in short, a vast difference for *Sandstrom* purposes between instructing the jury to presume a fact establishing an element of an offense and instructing the jury to exclude from consideration certain evidence. When evidence is excluded from consideration as legally irrelevant, the jury must nevertheless rely upon the remaining evidence to determine whether the State's burden of proof has been met. It is of no moment that certain evidence was not allowed to be used to rebut the State's case, which arguably made the State's case easier to prove. This does not create a presumption or violate due process because nothing in the "Due Process Clause bars states from making changes in their criminal law that have the effect of making it easier for the prosecution to obtain convictions." *McMillan v. Pennsylvania*, 477 U.S. 79, 89 n.5 (1986); *accord Medina v. California*, 112 S. Ct. 2572, 2580 (1992).

None of the authority relied upon by Respondent remotely suggests otherwise. He quotes extensively from *Carella* to support his assertion that a conclusive instruction contravenes constitutional principles. *Carella v. California*, 491 U.S. 263, 265 (1989) (per curiam). That quotation is not pertinent here because the instructions did not create *any* presumption, much less a mandatory one. Similarly, Respondent's reliance upon *Sullivan v. Louisiana*, 113 S. Ct. 2078 (1993), is misplaced. In *Sullivan*, this Court was concerned with a harmless error analysis of a defective reasonable doubt instruction. That a valid reasonable doubt instruction was given the jury in this case not only makes the holding in *Sullivan* inapposite but also supports Montana's position that the jury was properly instructed when the instructions are viewed as a whole. Respondent next cites *United States v. Gaudin*, 115

S. Ct. 2310 (1995). The question there was whether the issue of "materiality" was an element of the offense at issue and therefore a question of fact for the jury, not a question of law for the judge.[3]

Lastly, Respondent's contention that the voluntary intoxication instruction required that the "jury must find intent regardless of any evidence of intoxication" or that the instruction had the effect of "directing a verdict for the state" is pure hyperbole. First, the argument ignores the literal language of the instruction itself. That language, which directed the jury to exclude evidence of voluntary intoxication from its consideration in determining intent, negates any legitimate claim of a "reasonable likelihood" the jury presumed the presence of the requisite mental state from a fact they were told not to consider. *Boyde v. California*, 494 U.S. 370, 380 (1990); *accord Victor v. Nebraska*, 114 S. Ct. 1239, 1243 (1994); *Estelle v. McGuire*, 502 U.S. 62, 72 (1991). Second, Respondent's

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[3] Respondent additionally relies on *Martin v. Ohio*, 480 U.S. 228 (1987), to support the argument that the burden of proof somehow was improperly shifted. Resp't Br. at 26-27. Contrary to his apparent argument, however, the relevance of *Martin* to the Montana Supreme Court lay not in burden-shifting – since that court recognized the intoxication instruction did not shift the burden of proof to Respondent with respect to the mental state element – but in what the court characterized as the "lessen[ing]" of such burden. Pet. App. 15a. The Montana court's characterization was simply its manner of expressing the notion that a defendant has a due process-secured right to introduce all evidence relevant to his defense. Whatever the merit of that notion, and there is none under the circumstances here, it does not implicate the presumption-related burden shifting concerns to which *Sandstrom* and its progeny are directed.



contention in this regard ignores the instructions read as a whole, which unequivocally required the jury to determine whether the prosecution had proved "knowingly" or "purposely" beyond a reasonable doubt and, as discussed above, contained no presumption of fact concerning any element of the offense charged. Pet. App. 27a-30a (Instrs. Nos. 7-11, 13, 14).

## II. RESPONDENT HAS NO DUE PROCESS RIGHT TO PRESENT EVIDENCE OF A CONDITION WHICH HAS BEEN DEEMED BY THE STATE LEGISLATURE TO HAVE NO EXCULPATORY VALUE ON THE ISSUE OF INTENT.

Respondent contends that § 45-2-203 and the corresponding jury instruction denied him his due process right to present all evidence relevant to determining whether the elements of the charged offense have been proved. He cites *Chambers v. Mississippi*, 410 U.S. 284 (1973), for the proposition that he was denied his constitutional right to present a defense. At the same time, Respondent concedes, as he must, that the asserted right to present a defense has never been viewed as absolute. Respondent nevertheless makes no attempt to establish the parameters of such a right. He merely asserts that the right has never been made to yield to the categorical exclusion of highly reliable evidence, directly relevant to guilt or innocence, that has occurred in this case. Finally, he claims the fact that the voluntary intoxication evidence was heard by the jury but that it was told to disregard it on the issue of mental state adds an element of unconstitutional arbitrariness to the statutory scheme. Resp't Br. at 29-33.

The right to present a defense stems principally from the collection of specific rights guaranteed by the Sixth Amendment, such as the right to testify on one's own behalf, the right to confront witnesses, and the right to compulsory process. *See Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), *Rock v. Arkansas*, 483 U.S. 44 (1987), and *Washington v. Texas*, 388 U.S. 14 (1967). This Court has recently observed that the Due Process Clause has limited operation beyond the specific guarantees enumerated in the Bill of Rights. *Medina*, 112 S. Ct. at 2576. Respondent does not identify a specific Sixth Amendment guarantee that he was denied, nor could he.

This Court also has observed, in dicta, that, independent of the specific guarantees of the Sixth Amendment, the Due Process Clause generally protects the defendant's right to present a defense. *See Chambers*, 410 U.S. at 302; *Crane v. Kentucky*, 476 U.S. 683, 690 (1986). Those comments were unnecessary because the evidence excluded in both *Chambers* and *Crane* implicated specific Sixth Amendment rights, i.e., the rights of confrontation and compulsory process, and those decisions fall comfortably within the Sixth Amendment-based entitlement to those specific rights.

In asserting that a right to present a defense includes the right to present highly reliable evidence directly related to guilt or innocence, Respondent makes a glaring, and unwarranted, assumption – that voluntary intoxication evidence is a legally recognized "defense." His assumption, of course, is incorrect since it ignores that, in enacting § 45-2-203, the Montana legislature made the existence vel non of voluntary intoxication immaterial to the determination of any required mental state element.



Although this substantive change is manifested in procedural terms, i.e., preventing the jury from considering evidence of voluntary intoxication for the purpose of negating mental state, it is clearly a substantive rule of criminal culpability. *Cf. Michael H. v. Gerald D.*, 491 U.S. 110, 120 (1989) (observing that a conclusive presumption that the spouse of a woman is the father of her child "expresses the State's substantive policy" that the spouse should be held responsible for the child and that the integrity of the family unit should not be impugned). The Court has never suggested that the right to present a defense, whether invoked under the Sixth or the Fourteenth Amendment, imposes a per se constraint on a state legislature that precludes it from determining that certain conduct should have no exculpatory value for a particular purpose.

The situation here thus differs significantly from those in the right-to-present-a-defense cases cited by Respondent. In the latter, the Court assumed or specifically held that the evidence withheld is material to a fact which was exculpatory under the State's substantive law. Indeed, in most instances, the material fact involved was whether the defendant engaged in the culpable conduct at all. In *Chambers*, *Washington*, and *Crane*, as examples, the defendants attempt to prove that they had not committed the killings. In contrast, Respondent asserts a constitutional right to defend under the theory that his voluntary intoxication is exculpatory in the face of a specific state statute to the contrary.

More germane are decisions in which this Court recognized that state procedural rules barring the introduction of exculpatory evidence due to failure of defense counsel to comply with pretrial notice requirements do

not necessarily violate the Sixth Amendment. In *Taylor v. Illinois*, 484 U.S. 400 (1988), the Court upheld the exclusion of testimony of a witness known to defense counsel but not disclosed prior to trial, rejecting the claim that the Compulsory Process Clause required the court to allow the defendant to present the testimony. Based on findings that Taylor's discovery violation amounted to willful misconduct and was designed to obtain a tactical advantage, the Court determined that, "[r]egardless of whether prejudice to the prosecution could have been avoided" by a lesser penalty, "the severest sanction [wa]s appropriate." *Id.* at 413.

Similarly, in *Michigan v. Lucas*, 500 U.S. 145 (1991), the Court approved the exclusion of evidence of a rape victim's prior sexual conduct with the defendant on the ground that defense counsel did not disclose the testimony prior to trial as required by the Michigan Rape Shield law. The Court reasoned that in light of *Taylor*, inter alia, the Michigan Court of Appeals erred in adopting a per se rule that its State's notice-and-hearing requirement violated the Sixth Amendment Compulsory Process Clause in all cases where the State rule may be used to preclude evidence of past sexual conduct between a rape victim and a defendant. In stating that the Sixth Amendment is not so rigid, this Court observed that the notice-and-hearing requirement served legitimate state interests in protecting against surprise, harassment, and undue delay. *Id.* at 152-53. Thus, *Taylor* and *Lucas* hold that a state can constitutionally exclude evidence that may be highly probative of innocence for important policy reasons.

By logical inference from *Taylor* and *Lucas*, a state legislature may surely deem certain evidence to have no



exculpatory weight if, as here, the legislative action does not violate substantive due process principles. Even if the right to defend implicates rights broader than those guaranteed in the Sixth Amendment, it would fly in the face of historical tradition to conclude that it includes a right to defend on the ground of voluntary intoxication. At common law and at the time the Constitution was adopted, voluntary intoxication unquestionably was not considered exculpatory. As discussed in Montana's principal brief, this common law tradition counsels strongly against implication of a substantive due process right to rely upon voluntary intoxication for purposes of negating criminal intent. *E.g., Medina*, 112 S. Ct. at 2577-78 (examining common law tradition with respect to placing burden on defendant to establish lack of mental competence); *Schad*, 501 U.S. at 640-41 (examining common law tradition with respect to commingling premeditated murder and felony murder into single offense); *Patterson*, 432 U.S. at 201-03 (observing that affirmative defense of severe emotional distress under New York law was an expanded version of common law defense of heat of passion on sudden provocation and that at common law defendant had burden of proving such defense).

Tellingly, Respondent makes no mention of the strong common law tradition directly militating against his substantive due process claim of a right to rely on voluntary intoxication to negate the mental state element of deliberate homicide. He asserts, nevertheless, that voluntary intoxication evidence cannot constitutionally be excluded because it is "highly reliable." Resp't Br. at 31. Along the same lines, his amicus argues that modern procedures for precise measurement of a defendant's blood-alcohol level have erased the basis for the common law rule excluding

voluntary intoxication such that the common law rule is an "anachronism." Nat'l Ass'n of Crim. Defense Law. Br. at 24. What the Respondent and his amicus ignore is that it remains impossible to know based on the measurements of the level of blood alcohol when the alcohol was consumed. Thus, it is always possible that a defendant consumed the alcohol after committing the crime and did so with the hope, if not an expectation, that the evidence of intoxication might be a basis for arguing for a lesser offense or for complete exculpation. Surely, the State has a significant interest in deterring such conduct and that interest alone would be sufficient to justify amending § 45-2-203. Respondent's argument about modern procedures also ignores the fact that the common law rule was not based exclusively on a concern that defendants might exaggerate the extent of their intoxication. It also derived from the common law's reluctance to allow one form of inherently dangerous conduct to serve as a basis to negate criminal responsibility where a strong correlation existed between that conduct and the commission of crimes.

But regardless of technological change, it is impossible to square Respondent's argument that substantive due process requires that he be permitted to prove that voluntary intoxication prevented him from acting knowingly and purposely when it is uncontested by Respondent that such an argument would have been categorically rejected by all of the states in 1791 when the Due Process Clause was enacted. This uncontested history makes the due process issue in this case quite narrow. It is unnecessary for the Court to decide whether due process places limits on a state's general ability to declare certain conduct not exculpatory. The Court need only decide that the unique history surrounding the states' treatment of voluntary intoxication



at the time the Constitution was adopted is sufficient to defeat Respondent's substantive due process claim.

In sum, that the Montana legislature has determined that voluntary intoxication is not exculpatory with respect to an offense's mental state requirement distinguishes this case from those decisions upon which Respondent relies to establish a generalized right to present a defense where the asserted "defense" is not recognized under state law as being exculpatory. Accepting his theory would create a right so formless as to know no bounds and mark a radical departure from this Court's settled practice of extreme caution in using substantive due process principles to overturn legislative determinations. *See, e.g., Reno v. Flores*, 113 S. Ct. 1439, 1447 (1993) (" '[s]ubstantive due process' must begin with a careful description of the asserted right, for '[t]he doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field' ").

## III. WHETHER ANOTHER CRIME COULD HAVE BEEN CHARGED HERE OR WHETHER THE MAJORITY OF STATES FOLLOW MONTANA'S STATUTORY SCHEME RELATED TO THE VOLUNTARILY INTOXICATED OFFENDER IS IRRELEVANT TO THE CONSTITUTIONAL QUESTION PRESENTED.

Respondent asserts that the Montana Supreme Court's interpretation of federal constitutional law in this case will not dangerously restrict the states' ability to punish crimes committed while intoxicated. He suggests that there are several alternative courses Montana could pursue. For example, he postulates, instead of deliberate homicide, Montana could have properly charged him with negligent homicide or

could have created a strict liability crime entitled "causing death while voluntarily intoxicated." Respondent also notes that the States have power to regulate or prohibit alcohol and intoxicating drugs under the Twenty-first Amendment and under their police powers. He remarks finally that the Montana court's decision comports with the practice of the majority of the states and Montana's practice prior to 1987. Resp't Br. at 33-36. None of these arguments presents a serious basis for challenging Respondent's conviction.[4]

Respondent is incorrect when he states that the principle espoused by the Montana court, i.e., that a defendant has a fundamental constitutional right to present and have the jury consider voluntary intoxication on the issue of intent, comports with the practice of a large majority of states. Resp't Br. at 35. Under the specific/general intent scheme adopted by

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[4] Aside from the fact Respondent did not request at trial that the jury be instructed as to negligent homicide (Tr. 1155-61), the suggestion that he properly could have been charged with negligent homicide under Mont. Code Ann. § 45-5-104 (1995) begs the question. Respondent's argument in this regard apparently derives from his view that the term "negligently," as defined in Mont. Code Ann. § 45-2-101(42) (1995) and used as the mental state in § 45-5-104, imposes a reasonable and sober person standard. Resp't Br. at 35. Nonetheless, distinguishing the definitions of "knowingly" and "purposely" from that of "negligently" on the basis that the former incorporates a "subjective" standard and the latter adopts an "objective" one says nothing about whether giving the intoxication instruction at the trial which did occur violated Respondent's due process rights. Similarly, the fact that the Montana legislature could adopt particular criminal offenses directed at voluntarily intoxicated persons or that States have great latitude under the Twenty-first Amendment with respect to alcohol-related conduct is a truism which, again, has no bearing on the proper outcome here.



some states during the late nineteenth century, and continued by many states to the present day, voluntary intoxication does not operate to relieve a defendant completely from criminal responsibility. Rather, it was and is used as a mitigating factor which would only lead to the defendant's responsibility being lowered to a lesser crime.[5] The vast majority of States still limit the use of voluntary intoxication evidence. To Petitioner's knowledge, only one State, Indiana, is in accord with the Montana Supreme Court's decision mandating that voluntary intoxication evidence be allowed to be considered by the jury as to all crimes. The Indiana court's decision did not rest on federal constitutional grounds. *Terry v. State*, 465 N.E.2d 1085 (Ind. 1984). The remaining States generally either follow the common law rule by not allowing voluntary intoxication to negate intent, allow it to negate specific but not general intent, or allow it only to reduce the degree of murder.

The Constitution does not require that all States follow the same course or that they adopt what the Respondent or even this Court believes is the "best" course. The Court has recognized repeatedly that States have a wide discretion in fashioning methods to prevent and punish crime. A State's policy judgments will not be second-guessed unless those judgments offend some principle of justice so rooted in the traditions and conscience of our people as to be ranked

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[5] Under Section 22 of the Penal Code, enacted in 1895 and remaining unchanged until 1973, a defendant in Montana could not exonerate himself through his voluntary intoxication but could attempt to reduce the degree of the crime. *See State v. Palen*, 178 P.2d 862 (Mont. 1947); *State v. Brooks*, 436 P.2d 91 (Mont. 1967). Therefore, Respondent is mistaken that the Montana court's decision comports with the State's practice from 1895 to 1973.

fundamental. *Speiser v. Randall*, 357 U.S. 513, 523 (1958); *see also Schad*, 501 U.S. at 633; *Patterson*, 432 U.S. at 202. Montana's judgment that voluntary intoxication is not exculpatory with respect to the mens rea element of deliberate murder is a rational choice and Respondent does not argue to the contrary. Accordingly, Montana's law does not violate substantive due process and therefore Respondent's conviction should be affirmed.

## CONCLUSION

For the foregoing reasons and those stated in the State's Opening Brief, the judgment of the Montana Supreme Court should be reversed.

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